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In The

Supreme Court of The United States

October Term 1997

ROBERT and ANN CLYNES, as Parents and Next Friends of Nicholas Clynes,

Petitioners,

v.

FT. ZUMWALT SCHOOL DISTRICT, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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123 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the majority of the Eighth Circuit panel interpreted ***Board of Education v. Rowley***, 458 U.S. 176, 102 S.Ct. 3034 (1982) in a manner inconsistent with other circuit courts. The Eighth Circuit focused on that part of ***Rowley*** which stated that grades and grade promotion were an important factor in determining FAPE, and ignored standardized tests which established that Nicholas Clynes could not read at the end of the third grade. The Eighth Circuit found, in effect, "social promotion" to be the sole criterion by which FAPE is determined. Other circuits have interpreted "some educational benefit" as excluding de minimis and trivial educational achievement, thereby repudiating the concept of "social promotion." Thus, on similar facts, children with similar disabilities are subject to wildly differing interpretations of what FAPE is because when this Court in ***Rowley*** defined it as "some educational benefit," it intentionally left the meaning of that phrase undefined. Unequal justice has resulted.

II.

Whether the majority of the Eighth Circuit panel misinterpreted ***Rowley*** when it refused to defer to the findings of the district court. Other circuits provide that a district court has virtually de novo review over a due process hearing officer's decision. In the Eighth Circuit, the decision of the due process hearing panel is dispositive and may not be overturned by a district court, regardless of its independent review or gathering of new evidence. This split in the

circuits in regard to the deference to be accorded findings of a district court, and the role of a circuit court, have allowed for result-oriented decision making with the effect that children with disabilities receive unequal justice.

III.

Whether the majority of the Eighth Circuit panel created a split in the circuits when it held that in a two-tiered system, like that in Missouri, deference is due the due process hearing panel, not the State Level Review Officer. In the Third Circuit, it is the last state administrative officer that reviews an IDEA case to whom the deference is due. In the instant case, the due process hearing panel found two-to-one against the Clynes, but the State Level Review Officer reversed. The Eighth Circuit gave dispositive deference to the majority of the due process hearing panel, with the result that the decision in this case is exactly opposite of what it would have been had the Clynes lived within the Third Circuit.

LIST OF ALL PARTIES

Petitioners

Robert Clynes and Ann Clynes, as Parents and Next Friends of Nicholas Clynes.

Respondents

Ft. Zumwalt School District.

Dr. Bernard DuBray, Superintendent of the Ft. Zumwalt School District, at all times relevant.

Pat Moore, Director of Special Education Services for Ft. Zumwalt School District, at all times relevant.

Phyllis Wigg, Principal of the Hawthorne Elementary School, a school operated by Ft. Zumwalt School District, at all times relevant.

Linda Burke, a diagnostic technician employed by Ft. Zumwalt School District, at all times relevant.

Karla Ruhr, Special Education Teacher at Hawthorne Elementary School, at all times relevant.

Jeanie Lotz, First Grade Teacher at Hawthorne Elementary School, at all times relevant.

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After a one day due process hearing, a majority of the panel issued an opinion on or about February 9, 1993, denying reimbursement to the Clynes. (App. 10-21).[1]

Pursuant to an appeal made by the Clynes to the State Level Review Officer, he issued an opinion on June 29, 1993, in which he found that FAPE had been denied by the public school to Nicholas Clynes, and order reimbursement. (App. 22-36).

Ft. Zumwalt took an appeal to the district court which held a hearing and entered extensive findings of fact and conclusions of law which affirmed the State Level Review Officer, found that Nicholas had been denied FAPE by the public school, and ordered reimbursement to the Clynes. ***Ft. Zumwalt v. MO State Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996).

Ft. Zumwalt appealed to the Eighth Circuit which in a two-to-one opinion, reversed the district court and the State Level Review Officer, found that Nicholas had been provided FAPE by the public school, and denied reimbursement. ***Ft. Zumwalt v. Clynes***, 119 F.3d 607 (8th Cir. 1997).

On September 30, 1997, the Eighth Circuit denied the Petition for Rehearing with a Suggestion that It Be Reheard En Banc, filed by the Clynes.

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[1]Cites to "App." refer to the Appendix filed in the Eighth Circuit.

JURISDICTIONAL STATEMENT

The Eighth Circuit panel entered its decision on July 10, 1997. The Clynes filed a Petition for Rehearing, with a Suggestion that the Case Be Reheard En Banc. Both motions were denied on September 30, 1997. Petitioners Nicholas Clynes and his parents invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254.

Jurisdiction in the Eighth Circuit was invoked pursuant to 28 U.S.C. § § 1331, 1291, and 20 U.S.C. § 1415(e)(4)(A).

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1415:

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to - -

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the

child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit - -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) producers designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parent` or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decisi on by State educational agency

If the hearing required in paragraph (2) of subsection (1) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded - -

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in

calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if - -

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceedings begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that - -

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the

amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, tile V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1401(a)(18)

A "free appropriate public education" is defined as:

"special education and related services that - -

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

STATEMENT OF THE CASE

Introduction

Nicholas's Experience at Fort Zumwalt [The Public School]

Nicholas attended first grade at Hawthorn Elementary School during the 1987-88 academic year, a part of the Ft. Zumwalt School District. (App. 390).[2] Early in the school year his teacher began recommending retention. (App. 404). Despite Ann and Robert Clynes working two (2) to three (3) hours with their son each evening, Nicholas still failed his regular classroom English the first quarter of the school year. (App. 394, 412, 1061).

Nicholas was retained in first grade during the 1988-89 academic year. (App. 397). The IEP written for his repeat of the first grade identified weaknesses in reading, spelling, and math. (App. 734-741). Despite Nicholas's continued problems in these areas, the IEP decreased resource room time by 15 minutes a day. (App. 734-741).

Nicholas was promoted to the second grade during the 1989-90 school year. (App. 401, 1056-1063). The IEP for this academic year again reduced the resource room time, this time by thirty (30) minutes a day; thus, in second grade Nicholas was receiving special education assistance from the public school only one (1) hour a day. (App. 402, 742-748).

At the start of Nicholas's second grade year at the public school, in September 1989, the District re-evaluated him for learning disabilities. (App. 770-778). Test scores revealed that Nicholas's word attack skills, oral reading, and comprehension were all below grade level. (App. 771). Nicholas's writing was

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[2]Cites to "App." refer to the Appendix filed in the Eighth Circuit. Cites to "Pet. App." refer to the appendix in this document.

deemed below an age appropriate level. Id.

In May 1990, an IEP was developed for Nicholas's upcoming third grade year. (App. 783-791). That IEP did not set any goals for word attack skills despite the fact that the District attributed Nicholas's weakness with word attack skills to his learning disability. (App. 180). The focus of the IEP was on comprehension and memorizing Dolch sight word lists. (App. 241).

In 1990-91, Nicholas was promoted to third grade by the public school. (App. 405, 1056-1063). Except for science, Nicholas's grades were mostly Ds and Fs; Nicholas's resource room work showed a continuing decline. (App. 406-407, 1056-1063). Despite Nicholas's ongoing problems in third grade, his resource room time was decreased again by fifteen (15) minutes to forty-five (45) minutes a day. (App. 405).

A standardized test given to students in the State of Missouri, the MMAT, showed that in spring 1991 eighty-five percent (85%) of Nicholas's grade level peers read better than he did; he was in the fifteenth percentile (15%) in math; he was in the eighteenth percentile (18%) in science; and, the eighth percentile (8%) in social studies and civics; because the public school failed to teach Nicholas basic educational skills, his parents removed him to the Churchill School [the private school] so that he might receive an appropriate education. (App. 164-165, 1053-1055, 436, 429).

Nicholas's Experience at the Churchill School [The Private School]

The District Court found that at the private school, Nicholas's attitude and self-esteem improved as did his reading skills. (App. 334; 482-492; 570; 574; 576). As Nicholas made

academic progress and his word attack skills improved, his attitude, his willingness to meet new challenges, and his self-esteem improved. (App. 334, 212-213; 818-846). Nicholas benefitted from the private school's demystification program. (App. 578). He earned a roll in a school play about learning disabilities. (App. 578-579).

Standardized test results in September 1991, shortly after Nicholas left the public school for summer school at the private school, revealed that his reading skills ranked in the second to ninth percentile (2% - 9%). (App. 956). The same tests administered in May 1992, after a year at the private school, showed a rise in the ranking of Nicholas's reading skills to a range between the twelfth and fifty-fourth percentile. (12% - 54%). Id. Nicholas's rank in word attack skills jumped from the second percentile to the twenty-fifth percentile. (2% - 25%). Id. The tests administered by the public school in September 1992 showed improvement in Nicholas's word attack skills. (App. 856). Tests administered by the private school also revealed progress with word attack skills. (App. 866).

Due Process Hearing

Ann and Robert Clynes asked for a due process hearing, which was held on February 1, 1993. (App. F-10).

The majority opinion summarized the testimony presented to it, but did not weigh that testimony. (App. 11-13). In its "Decision and Rational" the majority opinion mis-stated the law and improperly placed the burden of proof upon the Clynes. (App. 32).

The majority opinion found that Nicholas was making progress at the public school by referring to "his regular class grade cards, his special education progress notes, and the report

from the private therapist working with him. . .." (App. 13). In coming to its conclusion that Nicholas made progress at the public school, the majority opinion did not refer to the standardized tests given by the State of Missouri, the MMAT. (App. 13).

The majority opinion denied reimbursement to the Clynes, on the basis that the public school had not tried "a more intensive service level such as a self-contained special education classroom or other supplementary aids . . .." (App. 13). The majority opinion ignored the fact that the public school never offered a self-contained classroom until after Nicholas succeeded at the private school in such a setting. (App. 663). The majority opinion ignored the undisputed testimony before it that the public school admitted that it had "tried everything it could think of" but failed, and had given up on Nicholas. (App. 432-434). The majority opinion did state that Nicholas had succeeded at the private school and that the private school needed to be consulted so that its program could be used at the public school. (App. 13-14).

The majority opinion did not determine whether the public school proved that it had provided a free appropriate public education to Nicholas; rather, implicitly noting the deficiencies of the public school program, it recommended that the private school program be adopted at the public school. (App. 14).

Decision of State Level Review Officer [SLRO]

The SLRO found that the various IEPs showed a hit and miss approach to dealing with [Nicholas's] failures; that there was no focused effort to follow-up on failures and to produce a plan of progress that could be clearly demonstrated; that teacher comments on Nicholas's report cards were for the most part well-intentioned attempts to find positive things for comment; however, the comments overstated performance and at times were contradictory.

(App. 34-35). The SLRO concluded that Nicholas was denied FAPE because: First, the panel improperly imposed a burden on the parents of proving that their son was regressing while attending the Ft. Zumwalt School District. Second, the panel improperly identified the issue before it. The question was not whether Nicholas was regressing. The question was whether the education being offered was appropriate. And, third, the majority never made credibility findings; there was nothing to indicate what weight or consideration the majority gave to the seven (7) witnesses who appeared before it. Fourth, there was no indication that the panel evaluated the various tests and reports describing Nicholas' progress. Fifth, the law requires more than a finding that Nicholas was not regressing and was making some unquantifiable progress.

The public school appealed to the district court.

Opinion of the District Court

The district court made thorough and comprehensive findings of fact and conclusions of law. ***Ft. Zumwalt v. MO State Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996). Those which are particularly salient for an understanding of the issues at bar are summarized as follows.

In September 1989, Nicholas's word attack skills were at a first-grade level. (App. 330, 1050). By May 1991, Nicholas's word attack skills had hardly improved; they were still at a first-grade level. Id.

When Nicholas entered the 1991 summer session at the private school, he could not read words that were new to him. (App. 331; 422, 560; 200; 1216-1218). He did not know his ABCs, the days of the week, or the months of the year. (App. 331; 477; 1191-1192).

Nicholas could identify three-letter consonant-vowel-consonant words, and he could use sighted words to garner the meaning of passages. (App. 331, 576, 590). That is, he could recognize words that he memorized, words from the Dolch site word lists, as one would recognize a picture or drawing but he had no way of figuring out a word that he had not seen before. (App. 331; 590-592). Nicholas therefore exhibited strength in the area of comprehension but serious weakness with word attack skills consistent with his learning disabilities. (App. 331; 1050, 1053-1055; 1216-1218, 732-732A).

Nicholas's performance in the public school had declined from first to third grade because it became harder and harder for him to memorize or retain the growing vocabulary he needed to pass his classes. (App. 331; 590-591). Mrs. Burke, the district's own psychological examiner, admitted that tests show that Nicholas was not reading at grade level when he left the public school. (App. 331; 604; 181).

A staffing report by the public school in October 1992 states that Nicholas experienced "significant academic growth" during the 1992-93 school year while attending the private school. (App. 338). According to the report, teacher observations indicated "emotional growth," specifically in the areas of "self-concept, task completion, task initiation, and the development of coping mechanisms to deal with frustration." (App. 337).

The district court noted that while Nicholas did advance at the public school from one grade to the next after the 1988-89 school year and passed many of his classes, most disturbingly, his word attack skills never advanced beyond a first-grade level while he attended the public schools. (App. 351). Even after the public school's methods did not succeed, it did not consider changing the

placement of Nicholas. (App. 351). The third grade IEP did not even set goals for word attack skills. (App. 351).

The district court found that by failing to address Nicholas's serious decoding problems, the public school failed to address adequately Nicholas's learning disability. (App. 351).

Opinions of Eighth Circuit Majority and Dissent

In a two-to-one decision a majority of the Eighth Circuit panel that heard this case ignored the findings of fact of the district court, ignored the findings of fact of the SLRO, and reinstated an equivocal and cursory four page opinion of the due process hearing panel majority.

Instead of deferring to the findings of fact made by the district court after its one day hearing in this case, or giving due deference to the findings of fact by the SLRO, or even examining the cursory and equivocal findings of fact of the due process hearing panel majority, the Eighth Circuit majority made its own findings of fact.

The majority of the Eighth Circuit found FAPE even though Nicholas was receiving Ds and Fs in reading, and standardized test scores showed that ninety-eight percent of his age appropriate peers read better than he did. The majority ignored findings below that Nicholas had been passed from grade to grade as a matter "social promotion," rather than academic achievement. The majority found that although Nicholas may well have benefitted more from his education at the private school, and did not read as well as his non-disabled peers, the "IDEA does not require the best possible education or superior results." ***Ft. Zumwalt***, 119 F.3d at 613. Citing to ***Board of Education v. Rowley***, 458 U.S. 176, 102 S.Ct. 3034 (1982), the majority concluded that courts have no specialized knowledge in matters of

special education; therefore, when a due process hearing panel finds some unquantifiable progress is being made, FAPE has been provided.

The dissent noted that as a standard of review, the SLRO was the one to whom the court owed deference under Missouri's two-tiered administrative system. Id. at 616. The dissent found that when the district court's findings of fact were reviewed for clear error, the correct standard, a conclusion that FAPE had been denied to Nicholas was mandated. "By the end of the year, Nicholas had failed spelling and had managed to raise a failing grade in reading for the third quarter to a D for the final quarter." As stated in the dissent:

> "I agree with the SLRO and the district court that the IEP for 1991-1992 was not designed to provide 'personalized instruction with sufficient support services to permit [Nicholas] to benefit educationally from that instruction.' Rowley, 458 U.S. at 203, 102 S.Ct. at 3049. By submitting an IEP substantially similar to others that had previously produced so few positive results, and by exhibiting an unwillingness to explore any different approaches, (fn. 10) [the public school] did not extend to Nicholas the free appropriate education mandated by IDEA. To be sure, Nicholas was steadily advancing from grade to grade in the [public] schools, and the Supreme Court has stressed that '[t]he grading and advancement system . . . constitutes an important factor in determining educational benefit,' Rowley, 458 U.S. at 203, 102 S.Ct. at 3049, but Nicholas's achievements, particularly in the area of reading skills can at best be described as trivial. This cannot be the sort of education Congress had in mind

> when it enacted the IDEA. [citation omitted] The majority, in resolving that [the public school] did offer Nicholas a free appropriate public education, not only does disservice to Congressional intent, but also disregards the deference we are required to give to the conclusion reached by the SLRO. (fn. 11)."

Id. at 617-618.

REASONS FOR GRANTING THE WRIT

Introduction

The Clynes request that this Court issue a Writ of Certiorari and hear this case so that it can make definite the meaning of the phrase "some educational benefit," used by it in ***Board of Education v. Rowley***, 458 U.S. 176,200, 102 S.Ct. 3034, 3048 (1982), and thereby eliminates the scourge of "social promotion." Second, the Clynes request that the writ be issued so that this Court can make clear the appropriate deference that must be shown to a due process hearing officer, or panel, and the extent of independent review to be accorded a district court. Third, the Clynes request that this Court clarify the deference due each of the various state administrative agencies deciding IDEA cases when there is a two-tier system of review.

In each of these situations there is a split in the circuits. In some instances there is virtually no standard. Each circuit has a different rule, standard, and analytical process by which it determines if FAPE has been provided. And, because there is no rule, and thus no single standard and no single process, the outcome of each case is dictated by the which circuit the parents live in rather than by any coherent, consistently applied rule of law.

Because this Court in ***Rowley*** left undefined the meaning of "educational benefit," there is no uniform interpretation of what it means. It means something different in each circuit, depending more on the personal predilections of judges than on a consistent analytical process based upon a fixed rule of law. What is educational benefit? In some circuits, standardized test scores which show de minimis results prove a denial of FAPE. In other circuits, being promoted from grade to grade while receiving Ds and some Fs is educational benefit, regardless of standardized test scores. Is educational benefit to be measured by objective testing of skills or by mere advancement from grade to grade, a process subject to manipulation by school authorities and known as "social promotion."

Similarly, in regard to the appropriate standard of review, the circuits employ widely differing and sometimes diametrically opposed standards. Once a due process hearing officer makes a decision, based upon whatever he thinks the phrase "educational benefit " means, there is a split in the circuits as to the deference to be accorded to such a decision. In this case, the Eighth Circuit decided that the due process hearing panel's finding of educational progress is, in effect, irreversible. If the due process hearing panel finds some unquantifiable "progress" is being made, as in this case, and there is evidence the child has been promoted to the next grade even with grades of Ds (social promotion), then the panel cannot be overturned, for by doing so the reviewing authority would impermissibly substitute its own notions of education for that of the panel, in violation of ***Rowley***. But, in the Fifth Circuit, the district court has virtually de novo review powers and may engage in an independent review and reverse a due process hearing officer's conclusion on educational benefit. The Ninth, Sixth,

Fourth, and Third Circuits also grant more deference to findings of fact made by the district court, than the Eighth Circuit.

In ***Rowley***, this Court left to the local educational authorities the methodology of teaching students with learning disabilities. This Court intentionally left undefined the contours of "some educational benefit," and the appropriate standards of review. That intentional vagueness has caused a split among the circuits and an injustice to Nicholas Clynes. If Nicholas Clynes had grown up and gone to school in Virginia, or California, for instance, he would have prevailed on the facts in this case. See, ***Carter v. Florence County School District Four***, 950 F.2d 156 (4th Cir. 1991), *aff'd*. ***Florence v. Carter***, 510 U.S. 7, 114 S.Ct. 361 (1993); ***Capistrano Unified School District v. Wartenburg***, 59 F.3d 884 (9th Cir. 1995). Presumably, if he had gone to school in Texas he would have prevailed because the Fifth Circuit gives far less deference to the due process hearing panel and far more independence to the district court. See, ***Cypress-Fairbanks v. Michael***, 118 F.3d 245 (5th Cir. 1997), *cert. denied* 118 S.Ct. 690 (1998).

As a result of this Court's lack of precision and definition in ***Rowley*** , justice for children with disabilities pursuant to the IDEA is random, uneven, and unpredictable. Children with similar disabilities and with similar needs are subject to different results in different circuits.

Some Educational Benefit

It is now time, some fifteen years after this Court's decision in ***Rowley***, for it to announce that a free appropriate public education ("FAPE") is not provided, and that some educational benefit is not provided, when objective tests show that a student after finishing the third grade cannot read. It is now time for this

Court to declare that "social promotion" is not FAPE and school districts can no longer rely on passing grades to avoid their responsibilities. While this Court noted in ***Rowley*** that advancement from grade to grade constitutes an important factor in determining educational benefit, the Clynes believe that "social promotion" cannot be a criterion for determining if FAPE has been provided. ***Rowley***, 458 U.S. at 203, 102 S.Ct. at 3049. Indeed, this Court stated in regard to passing grades and promotion from grade level to grade level:

> "We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.' In this case, however, we find Amy's academic progress, when considered with the special services and the professional consideration accorded by the Furnace Woods School Administration, to be dispositive."

Id. at fn. 25. The Clynes urge this Court to now give concrete contours to FAPE and guidance to the lower courts by declaring that objective measurements have an equally important place in the determination of whether a child with learning disabilities has received "some educational benefit." This Court should outlaw the scourge of "social promotion." The promotion of students with grades of Ds in order to avoid an adverse due process hearing decision must be stopped. Because of the lack of Guidance by this Court in ***Rowley***, the Eighth Circuit felt justified in giving no weight to the objective tests which established that Nicholas could not read after the third grade. Without the use of standardized test scores, how are parents like the Clynes to establish that school

districts passed a child from grade to grade so it could prevail in an IDEA case – the "social promotion" phenomenon. What evidence can a parent bring to bear to show that the school district does not provide an educational benefit to their child, in spite of the protestations to the contrary by the teachers, other than by showing that standardized and objective tests establish, as in this case, that as many as 98% of Nicholas's peers read better than he did after the third grade?

The Eighth Circuit relied on this Court's decision in ***Rowley*** to find that Nicholas was provided FAPE. Indeed, the dissent came to the opposite conclusion, also in reliance upon ***Rowley***. Yet, the majority of the Eighth Circuit came to its conclusion without discussing ***Rowley*** in detail. A close look at Amy Rowley, and a comparison of her situation to that of Nicholas Clynes, reveals that the lower courts are ignoring the facts in ***Rowley***, but using its generalizations to come to whatever educational conclusions their personal predilections dictate. The vagueness of ***Rowley*** allowed the Eighth Circuit to elevate "social promotion" over Nicholas's academic non-performance which was established by standardized tests.

Amy Rowley sought "a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP." ***Rowley***, 458 U.S. at 185-188, 102 S.Ct. at 3040-3041. Both the school administrators and the due process hearing officer denied the Rowley's request because Amy was making satisfactory progress educationally, academically, and socially without such assistance. *Id.* In contradistinction, the Eighth Circuit acknowledged that Nicholas Clynes had behavioral difficulties at Ft. Zumwalt. ***Ft. Zumwalt School District v. Clynes***, 119 F.3d 607, 612 (8th Cir. 1997). "Evaluations of Nicholas done

when he was in second grade characterized him as poorly motivated, easily frustrated, and feeling different from his peers." *Id.* Unlike Amy Rowley, Nicholas Clynes was not making satisfactory progress socially.

Educationally, the district court found that Amy was a remarkably well-adjusted child who interacted and communicated well with her classmates and had developed an extraordinary rapport with her teachers. ***Rowley***, 102 S.Ct. at 3040. As for Nicholas, the Eighth Circuit noted that his teachers told Mrs. Clynes that they did not know what else to do for Nicholas since he had chosen not to learn. ***Ft. Zumwalt***, 119 F.3d at 612. The Director of Special Education told Mrs. Clynes that some children are just non-readers. *Id.* Unlike Amy Rowley, Nicholas Clynes did not have a good rapport with his teachers. Nick's teachers, and even the special education director, had quit on him.

Academically, the district court found that Amy Rowley performed better than the average child in her class and was advancing easily from grade to grade. ***Rowley***, 458 U.S. at 185, 102 S.Ct. at 3040. But, the Eighth Circuit noted that Ft. Zumwalt wanted to hold back Nicholas Clynes for a year in kindergarten. ***Ft. Zumwalt School District***, 119 F.3d at 612, fn. 3. Rather than easily passing from grade to grade, Nicholas repeated first grade. Unlike Amy Rowley, Nicholas Clynes did not advance easily from grade to grade.

In ***Rowley,*** this Court criticized the lower courts' requirement that a school district maximize the potential of its students. The district court, understanding FAPE as an opportunity to achieve one's full potential commensurate with the opportunity provided to other children, found a denial of FAPE in the disparity between Amy's actual achievement and her potential. ***Rowley***, 458

U.S. at 185-186, 102 S.Ct. at 3040. In the instant case, Nicholas Clynes never argued that Ft. Zumwalt was required to maximize his potential. What Nicholas Clynes argued, and what the SLRO, the district court, and the dissent on the Eighth Circuit panel found, was that the dramatic disparity between him and his age appropriate peers, as defined by objective measurements, and his inability to read, established that he was receiving a trivial educational benefit.

In IDEA appeals district and circuit courts sometimes defer to the due process hearing panel's findings of fact and sometimes do not, leaving in their wake uncertainty and decisions dictated by result-oriented biases. It cannot be left to the discretion of appellate judges in the various circuits to decide what "some educational benefit" means. Clearer guidance from this Court is mandated.

The Eighth Circuit majority found that grades of Ds and Cs, and an inability to read as measured by an objective standard, met this Court's test of "some educational benefit." The dissent noted that "Nicholas had failed spelling and had managed to raise a failing grade in reading for the third quarter to a D for the final quarter." ***Ft. Zumwalt***, 119 F.3d at 616-617. The dissent in this case, citing ***Rowley***, found that FAPE contemplates something more than mere trivial advancement.

In contradistinction to the Eighth Circuit, the Second Circuit in ***Mrs. B. v. Milford Board of Education***, 103 F.3d 1114, 1120-21 (2nd Cir. 1997), reasoned that the ***Rowley*** standard contemplates more than mere trivial advancement. In that case, the Second Circuit, in discussing the phrase "educational benefit," as used by this Court in ***Rowley***, found it to be a matter that the trial court must determine on the preponderance of the evidence.

Id. The Second Circuit then noted that this Court in ***Rowley*** did not establish one standard for determining what constitutes meaningful educational benefit, but noted that such factors as grading and advancement were important. The Second Circuit noted that other circuits have held that this standard contemplates something more than "mere trivial advancement." *Id.* at 1121. In regard to the substantive issue, the Second Circuit noted that the child failed to meet nearly all the objectives set in her IEP and that nearly all of her grades were all unsatisfactory. "It is an inescapable fact that over the course of three years, despite being of average to just slightly below-average intelligence, MM did not advance more than one grade level in any subject." *Id.* In the instant case, the public school wanted to hold Nicholas back in two of his first five years. Nicholas did repeat the first grade. When he left the public school at the end of his third year he did not know his ABCs, the days of the week, or the months of the year. Ninety-eight percent of his age appropriate peers could read better than Nicholas. Yet, he was of above-average intelligence. In striking contradistinction to the Second Circuit in ***Mrs. B***, the majority of the Eighth Circuit panel never discussed trivial education or advancement. What the panel majority did say was that Nicholas received some benefit and therefore he was provided FAPE under ***Rowley***, even though he could not read. But the Eighth Circuit majority found that the request by his parents that he learn to read as well as his age-appropriate peers was not covered by the IDEA, which "does not require the best possible education or superior results." ***Ft. Zumwalt v. Clynes***, 119 F.3d at 613. This Court should strike down the notion that reading at grade level for a child with above-average intelligence is deemed a "superior result," lest parents, school teachers, and courts fail to

demand that children be educated in public school and not warehoused there.

In ***M.C. v. Central Regional School District***, 81 F.3d 389 (3rd Cir. 1996), the parents of J.C., a severely retarded sixteen year old boy, sought both a residential placement and compensatory education for what they believed to be long-standing deficiencies in his educational program. The due process hearing officer found that J.C. was not capable of more than very limited progress and that in light of the slight improvement shown by J.C. the school district had provided him the educational benefit required by ***Rowley***. The district court reversed the due process hearing officer finding that "some educational benefit" meant something more than de minimis benefits. "According to the district court, the 'limited and varied' progress that the [due process hearing officer] found was de minimis and therefore not sufficient to satisfy IDEA." ***M.C.***, 81 F.3d at 393.

In the Eighth Circuit, a finding of the due process hearing officer that J.C. had benefitted from his public school education would have been irreversible. Substantively, the Third and Second Circuits require something more than the unquantifiable progress the due process hearing panel found that Nicholas made. In those circuits, Nicholas's standardized test scores and grades of below a C would have been sufficient for the district court to have made independent, virtually de novo, findings of no educational benefit. A district court finding which was made in this case, that would have been affirmed in those circuits.

Objective tests must be an important factor in determining FAPE. This Court must draw a bright line and say that the failure to read as measured by objective tests is an important and perhaps dispositive factor in determining whether FAPE has been provided.

If subjective measures such as grades and grade promotion are dispositive, school districts will always "socially promote" a learning disabled child. Certainly, that is the advice school district attorneys are providing in the Eighth Circuit after the ***Clynes*** decision.

Amy Rowley was provided FAPE because she could easily pass her classes, be promoted from grade to grade, displayed superior intellect, and got above-average grades. In the Eighth Circuit, Nicholas Clynes was provided FAPE even though he could not read, was flunking spelling and reading, and got no grade higher than a C in anything, but was nevertheless "socially promoted."

Because there is no uniform rule of law created by this Court which is to be followed by lower courts in their analysis of whether "some educational benefit" has been provided, the family in ***Mrs. B.*** in the Second Circuit, and the family of J.C. in the Third Circuit are reimbursed for their heroic efforts to secure an appropriate education for their children; but, for indiscernible reasons, the family of Nicholas Clynes is forced to bear the brunt of their heroic efforts alone. By refusing to set a standard this Court has allowed for the provision of unequal justice and unequal education for Nicholas and those like him in the Eighth Circuit. Any family reading the Eighth Circuit's opinion in ***Clynes*** will think long and hard before removing their child to a private school; even if that child is angry, frustrated, acting out, and behaviorally disordered due to his failure to read, a failure the school district admits it does not know how to correct.

UNLIMITED DISCRETION
Different Circuits, Different Standards
Different Process, Different Results

The split in the circuits is strikingly borne out when the instant case of the Eighth Circuit, ***Ft. Zumwalt v. Clynes***, 119 F.3d 607 (8th Cir. 1997), is compared to ***Cypress-Fairbanks v. Michael***, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 690 (1998). Both cases involve children with significant disabilities which affected them behaviorally and impacted upon their academic progress. In ***Cypress***, Michael had significant behavioral disorders and sporadic but significant episodes of violent outbursts. Id. at 247-253.

As a result of a fight that Michael got into with a girl in his class where he pinned her to floor with his knee and pulled out some of her hair, "Michael's parents perceived this incident as a serious escalation of Michael's behavioral problems and therefore renewed their previous consideration of alternative placements for Michael, including a residential psychiatric institution." Id. at 250-251. Michael's parents requested that the public school approve Michael's placement "and reimburse them for the cost of the placement." Id. at 251. The school district declined. Id.

Michael's parents sought review of the school district's denial of the request for reimbursement in an impartial due process hearing before the Texas Educational Agency. Id. The due process hearing officer conducted eleven days of hearing in April 1993 and, in a lengthy opinion, which the Fifth Circuit called "a carefully written decision," found for the parents. Id. at 251-252.

The school district appealed to district court and, after a one day hearing, that court reversed the due process hearing officer. As stated by the Fifth Circuit, the district court "did not

attempt to refute or discredit each of the hearing officer's findings in support of his conclusion that the school district's educational program for Michael was inappropriate." *Id.* at 253.

Strikingly, the Fifth Circuit affirmed the district court's rejection in toto of the due process hearing officer's lengthy, well reasoned, and well written opinion because the district court "must ultimately reach an independent decision based on a preponderance of the evidence. Accordingly, the district court's 'review' of a hearing officer's decision is 'virtually de novo.'" *Id.* at 252. The Eighth Circuit said just the opposite. In the instant case, the due process hearing panel in a two-to-one, cursory and equivocal opinion, denied reimbursement to the Clynes even as it recommended that the public school mimic the program of the private school that had worked so well for Nicholas. On appeal, the SLRO rejected the decision of the majority of the due process hearing panel in a lengthy and well-reasoned opinion. See, Pet. App. at 38 - 52. The district court analyzed the evidence in detail, point by point, and made numerous findings of fact, and after a one day hearing held that Nicholas had been denied FAPE and ordered reimbursement to the Clynes. ***Ft. Zumwalt v. Missouri State Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996). The district court found a denial of FAPE by relying on ***Rowley***. The Eighth Circuit reversed, relying on ***Rowley***. The district court and the dissent in the Eighth Circuit read ***Rowley*** one way and the majority read it another. Four federal judges read ***Rowley*** and divided equally as to what it meant. Some greater guidance is required, and not just in the Eighth Circuit.

There is no language in the Eighth Circuit opinion, like there is in the opinion of the Fifth Circuit, about the independent review authority of the district court. It is instructive that the Fifth

Circuit talks about the district court's review as being virtually de novo, while the Eighth Circuit relegates district court review to the point of formality.

The lengthy and well-reasoned opinion of the due process hearing officer in ***Michael*** was ignored by the district court. The district court was affirmed on appeal because it has unfettered, virtually de novo review authority in the Fifth Circuit. But, in the Eighth Circuit, it is unlawful for a district court to engage in de novo, independent review of the due process hearing officer.

Because this Court has created a vacuum in IDEA cases when it refused to draw lines in ***Rowley***, the situation arises that every person who has reviewed this case has cited to ***Rowley*** for support. The tally is four-to-four. The due process hearing panel denied reimbursement to the Clynes in a two-to-one opinion. The SLRO found that FAPE was not provided to Nicholas and ordered reimbursement. The district court judge agreed with the SLRO and ordered reimbursement to the Clynes. Two members of the Eighth Circuit panel found FAPE, while the third member of the panel dissented, finding that the district court was correct.

But it is not just a difference of analytical process between the Eighth and Fifth Circuits that warrants the grant of certiorari. A review of the following cases demonstrates that the vacuum created by ***Rowley*** has spawned myriad approaches throughout the circuits that foster result-oriented decision making, with the inevitable effect that outcomes in IDEA cases are unpredictable.

Another approach is that taken by the Fourth Circuit in ***Carter v. Florence County School District Four***, 950 F.2d 156 (4th Cir. 1991). This is also a reimbursement case and one in which this Court granted certiorari to resolve a conflict among the courts of appeal to determine only whether parental placement in a

private school cannot be proper under the IDEA unless the private school in question meets the standards of the state educational agency. ***Florence v. Carter***, 510 U.S. 7, 114 S.Ct. 361, 364 (1993). The Carters sought reimbursement for the private school tuition of their learning disabled daughter, Shannon. The public school had proposed an IEP for Shannon in which she would have remained in regular classes with two periods per day in the resource room. ***Carter***, 950 F.2d at 158-159. Shannon's parents objected to the proposed resource room placement, believing that it would be inappropriate to place Shannon alongside students with emotional illnesses and mental retardation. Instead, her parents requested a learning disabilities itinerant program in which Shannon would receive individualized attention from a special education teacher. Dissatisfied with the IEP, Shannon's parents requested a due process hearing to challenge the appropriateness of the school district's educational program. Both the due process hearing officer and the SLRO rejected the argument of Shannon's parents and concluded that the IEP provided Shannon with a free appropriate public education. Like the district court judge in the instant case, the district court in ***Carter*** reversed the due process hearing officer after a bench trial. The district court concluded that, although the school district did not breach the procedural requirements of the IDEA, it did fail to provide Shannon with FAPE. The district court found that the IEP's goals of a mere four months' progress in mathematics and reading allowed Shannon to "continue to fall behind her classmates at an alarming rate" and therefore "ensured the program's inadequacy from its inception." *Id.* The district court also found itinerant study of only three periods per week inadequate to "allow her to receive passing marks and advance from grade to grade." The district court also noted

the significant progress made by Shannon at her private school, Trident.

The district court's conclusions in ***Carter*** are similar to those of the district court in this case. After a bench trial, the district court found that Nicholas was unable to read when he left Ft. Zumwalt. The district court further found that Nicholas made significant progress at the Churchill School (the private school).

Strikingly, rather than reject the district court's reversal of both the due process hearing officer and the SLRO, as the Eighth Circuit would have done, the Fourth Circuit affirmed. The Fourth Circuit never used language that indicated the due process hearing officer was the state educational expert, to be deferred to in all instances. Rather, in affirming the district court, the Fourth Circuit in ***Carter*** stated yet another standard:

> "In light of these principles, we can not say that the district court's conclusion was clearly erroneous. The school district drafted the IEP to apply to a learning disabled tenth grade student whose reading and mathematics skills were at a fifth and sixth grade level, respectfully."

Carter, 950 F.2d at 160.

We now have three standards, all from different circuit courts citing ***Rowley*** as support. In the Eighth Circuit, the due process hearing officer is a state educational expert and any decision made by him or her is binding. In the Fifth Circuit, the district court need not and should not defer to the due process hearing officer, because the district court's independent determination is virtually de novo. In the Fourth Circuit, there is no deference to the due process hearing officer; but, there is no mention of independent review which is virtually de novo. The

district court's findings of fact and conclusions of law will be upheld unless "clearly erroneous." As noted by the dissent in the instant case, the clearly erroneous standard was rejected by the Eight Circuit majority. ***Ft. Zumwalt v. Clynes***, 119 F.3d at 617.

In the Ninth Circuit, the rule is that the district court reviews de novo the appropriateness of the special education placement. ***County of San Diego v. California Special Education Hearing Office***, 93 F.3d 1458, 1466 (9th Cir. 1996). The district court is free to accept or reject the findings of the due process hearing officer in part or in whole. *Id.* "At bottom, the court itself is free to determine independently how much weight to give the administrative findings in light of the enumerated factors." *Id.* Unlike the Eighth Circuit, in the Ninth Circuit the "district court's findings of facts are reviewed for clear error and its conclusions of law are reviewed de novo. . .. However, the district court's factual determination that a student is incapable in deriving educational benefit outside of a residential placement is reviewed for clear error." ***Seattle School District v. B.S.***, 82 F.3d 1493, 1499 (9th Cir. 1996).

In the instant case, both the SLRO and subsequently the district court judge examined in detail the cursory findings of the due process hearing panel and found a denial of FAPE. In a lengthy and detailed opinion, the district court judge found facts after hearing new evidence and painstakingly examining the record before him. ***Ft. Zumwalt v. Mo Board of Education***, 923 F.Supp. 1216 (E.D. Mo. 1996). In the Ninth Circuit, the district court judge would have had his findings reviewed for clear error. In the Eighth Circuit, the circuit court conducted a plenary, de novo review. The Clynes would have won in the Ninth Circuit, but lost in the Eighth Circuit.

In the Seventh Circuit, the district court's decision is reviewed to ascertain if there is a mistake of law. If there is not, then the district court's decision is reviewed under the clearly erroneous standard. ***Monticello School District No. 25 v. George L.***, 102 F.3d 895, 905 (7th Cir. 1996). If the Seventh Circuit's standard of review had been used here the Clynes would have won.

If the decision of whether FAPE was provided is a matter of fact, then a district court's independent review of the administrative decisions is reviewed for clear error. That is the rule in the Third Circuit. ***Carlisle Area School v. Scott***, 62 F.3d 520 (3rd Cir. 1995). Consequently, under that standard, much discretion is invested in the district court. In the Eighth Circuit, no discretion is vested in the district court, since the "ultimate decision" is reviewed de novo.

Because the analysis is so completely different between the Eighth and the other circuits, differences in result are inherent and unequal justice is the result. As noted by Justice Scalia, it is difficult to ascertain why we treat some of these questions as matter of fact and others as matters of law--"though I imagine that the relative importance to our liberties has much to do with it." *Scalia*, ***56 University of Chicago Law Review*** at 1182. It is the Clynes' hope that this Court will grant certiorari and declare that the question of FAPE is a matter of fact, not a matter of law. That district courts may engage in independent review that is virtually de novo, which is not to be reversed unless clearly erroneous. As noted, eight individuals have reviewed this case and the vote is split four-to-four. This is a result of the lack of guidance from this Court and an absence of a uniform rule of law. When there is no rule of law, any judge can reach any conclusion and cite ***Rowley*** for support.

Deference to SLRO

It is the process that determines the result. If the standards of review are different, then the result will be different. To whom deference is accorded is dispositive. In the Third Circuit, deference is to be accorded to the last state administrative officer that reviews under IDEA. That would be the SLRO in the instant case. In the Eighth Circuit, just the opposite is true. There is no deference given to the SLRO because the Eighth Circuit has concluded that the due process hearing panel's decision is supreme.

In ***Carlisle Area School v. Scott***, 62 F.3d 520 (3rd Cir. 1995), the Third Circuit determined that it was appropriate under the IDEA to defer to the State Level Reviewing Officer, except where the due process hearing panel made specific credibility based findings. ***Carlisle***, 62 F.3d at 528-529. However, even in regard to credibility determinations, the SLRO's determination is to be given deference if it involves record-supported credibility determinations. Id. And, as stated by the Sixth Circuit in ***Thomas v. Cincinnati Board of Education***, 918 F.2d 618, 624 (6th Cir. 1990), "the only logical position under Rowley, and general principals of administrative law, is that federal courts are required to defer to the final decision of the state authorities, in this case that of the [SLRO]."

In the instant case, the SLRO noted that because the panel sits and hears the testimony of witnesses before it, great deference should be given to the manner in which it weighs the evidence. However, the SLRO further noted that in order to receive such deference "there must be some indication that [the panel] did in fact weigh the evidence." (App. 32-34). As the SLRO went on to state:

"In the present case the majority [of the due process hearing panel] rests its determination that Nicholas was making progress on his grade cards, special education progress notes, and the report of a private therapist who had worked with him. There is nothing to indicate what weight or consideration the majority gave to the seven witnesses who appeared before it. There is no indication that it evaluated the IEPs that had been prepared for Nicholas throughout the years. There is no indication that it considered the testimony that the district had given up on Nicholas. There is no indication that it evaluated the various tests and reports described in Nicholas's behavior. In addition, the law requires more than a finding that Nicholas was not regressing and was making some unquantifiable progress.

"The only place in the majority decision where there is evidence that it considered these other factors is in that part of the decision which recommends the involvement of the Churchill staff preparing the next IEP, that counseling support be provided and that one teacher manage Nicholas' education program. The inference to be drawn from these findings is, as parents argue, that the district had not met its responsibility to provide Nicholas an appropriate education."

(App. 32-34).

The majority of the Eighth Circuit stated that where

> "there is a conflict between the findings and conclusions of the hearing panel and the final reviewing officer, a court may choose to credit the hearing panel's findings based on observations of witnesses and reject the reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators."

Ft. Zumwalt, 119 F.3d at 610. But, both the SLRO and the district court found that the majority of the due process hearing panel did not weigh the evidence. What the Eighth Circuit is really saying is that the district court and the SLRO are superfluous. It does so by elevating high school teachers on the due process panel to state educational experts. There is no support in the record for this pronouncement and no other court has ever made such a finding.

In the Third and Sixth Circuits there are definite standards. The final review officer of the state is the one to be deferred to, except in those situations where credibility based findings have been specifically and expressly made by the due process hearing officer. The district court opinion is reviewed for clear error because placement and appropriateness under the IDEA are factual questions.

The Eighth Circuit rules de novo on every question presented in an IDEA case deferring only to the so-called state educational experts on the due process panel. This is not only a split in the circuits, it is a recipe for unequal justice. The Clynes find it disquieting that where they live is more important in an IDEA case than the facts. It should not be the misfortune of Nicholas Clynes that his parents live in the Eighth Circuit.

The Clynes request that this Court issue its Writ of

Certiorari and declare that deference is to be paid to the SLRO, as is the rule in the Third and Sixth Circuits.

CONCLUSION

The Clynes respectfully request that this Court issue its Writ of Certiorari to the Eighth Circuit and vacate that court's decision and reinstate that of the district court which granted reimbursement to the Clynes upon a finding that FAPE had not been provided by the public school.

Respectfully Submitted,

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